

No. 11,592

IN THE

United States Circuit Court of Appeals  
For the Ninth Circuit

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HARMON M. WALEY,

*Appellant,*

vs.

JAMES A. JOHNSTON, Warden,  
United States Penitentiary,  
Alcatraz, California,

*Appellee.*

BRIEF FOR APPELLEE.

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JUN 27 1947

PAUL P. O'BRIEN,  
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**BRIEF FOR APPELLEE.**

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**JURISDICTIONAL STATEMENTS.**

This is an appeal from an order of the United States District Court for the Northern District of California, hereafter called the "Court below", denying Appellant's petition for writ of habeas corpus and discharging the order to show cause. (Tr. p. 21.) The Court below had jurisdiction of the habeas corpus proceedings under Title 28 U. S. C. A. Sections 451, 452 and 453. Jurisdiction to review the District Court's order denying the petition is conferred upon this Court by Title 28 U. S. C. A. Sections 463 and 225.

### STATEMENT OF THE CASE.

The Appellant, an inmate of the United States Penitentiary at Alcatraz, California, filed a petition for writ of habeas corpus (Tr. pp. 1-7) and the Court below issued an order to show cause. (Tr. p. 8.) Thereafter the Appellee filed a return to order to show cause (Tr. pp. 9-10) and a memorandum of points and authorities in support thereof, contending that the petition should be denied on the basis of prior denials in several habeas corpus applications heretofore filed by the appellant (Tr. pp. 11-14). The Appellant then filed a reply to return to order to show cause (Tr. pp. 15-21). The matter was submitted and the Court below filed its written order denying the petition for writ of habeas corpus and discharging the order to show cause. (Tr. p. 21). From this order appellant now appeals to this Honorable Court. (Tr. p. 25.)

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### QUESTION.

Was the Court below under an obligation to produce the body of appellant before it to determine if he was entitled to his discharge?

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### CONTENTION OF APPELLEE.

The answer to the above stated question is: NO.

### ARGUMENT.

The facts leading up to the filing of the instant petition are set forth in the decision of U. S. District Judge Louis E. Goodman, denying petition for writ of habeas corpus in case No. 24837-G (civil) (Tr. pp. 11-13) and a similar order entered on August 6, 1945, by this Honorable Court in an undocketed case involving the Appellant herein (Tr. p. 13). The Court below, in denying the instant application declared:

“The instant petition is petitioner’s fifteenth application for writ of habeas corpus filed before Federal Courts in the Ninth Circuit and in it he alleges nothing other than that which he has heretofore urged as grounds for his release.

“Although *res judicata* does not apply in habeas corpus proceedings, a prior refusal to discharge on a like petition may be considered and give controlling weight.” (Tr. p. 21.)

In support of its order, the Court below cited as authority the decisions in this Honorable Court in the following cases:

*Swihart v. Johnston*, 150 F. (2d) 721; Certiorari denied 327 U. S. 789;

*Garrison v. Johnston*, 151 F. (2d) 1011; Certiorari denied 328 U. S. 840;

*Wilson v. Johnston*, 154 F. (2d) 111; Certiorari denied 328 U. S. 872;

*McMahan v. Johnston*, 157 F. (2d) 915; Certiorari denied April 28, 1947.

In reliance on these decisions of this Honorable Court and in further reliance on the later decision of this Court, sitting en banc, in the case of *Price v. Johnston*, No. 11,334, decided May 5, 1947, Appellee asserts that on the record before it, the Court below was under no obligation to issue the writ and properly decided the merits of appellant's petition on the order to show cause.

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**CONCLUSION.**

In view of the foregoing, it is respectfully submitted that the order of the Court below in denying petition for writ of habeas corpus was correct and should be affirmed.

Dated: San Francisco, California,  
June 27, 1947.

FRANK J. HENNESSY,  
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